Supreme Court, U.S.
FILED

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No. _____

# In the Supreme Court of the United States

JEFFERY DIEFFENBACH,
Petitioner,
v.

JOHN BRIAN HAWORTH, DEBTOR,
BARBARA H. KATZ, TRUSTEE,
Respondents.

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether a Chapter 7 bankruptcy trustee has an affirmative duty under 11 USC §704 to (A) administer undisclosed assets of approximately $1.3 million in this purported "no asset" consumer bankruptcy case, (B) furnish information to creditor Jeffery Dieffenbach, per his request, and (C) act in good faith.

2. Whether the standard for imposing personal liability on a Chapter 7 trustee for breach of duty and loss of assets is intentional negligence, simple negligence or gross negligence.

3. Whether a pre-petition state court motion filed by Petitioner Jeffery Dieffenbach against the debtor constitutes an "action or proceeding against the debtor" and thereby qualifies for statutory damages under 11 USC §362(k).

## LIST OF PARTIES

The Petitioner, Pro Se, is Jeffery Dieffenbach, an unsecured creditor of this bankruptcy case.

Respondents are John Brian Haworth, the debtor, and Barbara H. Katz, the Chapter 7 trustee.

None of the parties are corporations.

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1. The decision of the Second Circuit conflicts with the Fourth Circuit with respect to the Trustee's affirmative duties under 11 USC §704.

2. There is a conflict between *all* circuit courts regarding the standard of care for imposing personal liability on a Chapter 7 bankruptcy trustee for breach of duty.

3. The Second Circuit erred when it took an improperly narrow view of its own case law and interpretation of 11 USC §362(k) allowed damages for violation of the automatic stay.

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## PETITION FOR WRIT OF CERTIORARI

Jeffery Dieffenbach respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

## OPINIONS BELOW

The Summary Order of the Court of Appeals for the Second Circuit is reported at 356 Fed. Appx. 529, 2009 US App. LEXIS 27457. An Order denying a Petition for Rehearing *en banc* is unpublished. The opinion of the US District Court, District of Connecticut is reported at 2008 Dist. LEXIS 87906.

## JURISDICTION

The judgment of the court of appeals was entered December 16, 2009. A timely petition for rehearing *en banc* was denied on March 5, 2010. The jurisdiction of this Honorable United States Supreme Court is invoked under 28 USC §1254(1).

## STATUTORY PROVISIONS INVOLVED

This Petition involves the following provisions of the US Bankruptcy Code:

**11 USC §324 (Removal of trustee or examiner)**

(a) The court, after notice and a hearing, may remove a trustee, other than the United States trustee, or an examiner, for cause.

**11 USC §704 (Duties of Trustee)**

(a) The trustee shall –

(1) collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest;

.....

(7) unless the court orders otherwise, furnish such information concerning the estate and the estate's administration as is requested by a party in interest.

**11 USC §362 (Automatic Stay)**

(a) a petition filed under section 301, or 302 or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of

(1) the commencement or continuation, including the issuance of employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

.....

(k) an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

## STATEMENT OF THE CASE

**"A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior ... Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd."**
**Benjamin N. Cardozo, CJ, Meinhard v. Salmon, 249 NY 458, 464 (1928).**

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This is one of the more significant Chapter 7 "no asset" bankruptcy cases to reach this Honorable Court because it involves the irresponsible conduct of a well-respected bankruptcy trustee who stubbornly refused to marshal and administer undisclosed estate assets exceeding $1 million, thus allowing the debtor to escape prosecution for his brazen scheme of deceit, asset diversion and concealment, move to his native England and benefit financially at the expense of creditors.

Resolution of the questions presented here will largely determine the duties and *accountability* of Chapter 7 trustees and the extent to which they should be removed for "cause" for breach of duty and held personally liable for the loss of estate assets.

On February 16, 2001 debtor John Brian Haworth and his attorney, Francis J. Browne, filed a purported "no asset" Chapter 7 bankruptcy with accompanying schedules under oath with the US

Bankruptcy Court, District of Connecticut (Bridgeport Division, Case No. 01-50184). The debtor's discharge was granted June 12, 2001 and the case was closed on September 12, 2001. Mrs. Haworth did not join her husband in filing for bankruptcy protection.

Unrelated to these bankruptcy proceedings, Dieffenbach entered into an October 4, 2000 stipulated money judgment with the Connecticut Superior Court at Stamford (Case No. CV-00-0177306-S) in the amount of $30,000 to settle a disputed matter with his former parents-in-law. When it became apparent that the Haworths would not honor their part of the bargain, on February 2, 2001, pre-petition, Dieffenbach timely filed a Motion to Set Aside or Reopen the state court judgment alleging claims and unfulfilled promises against the debtor and his wife, namely the return of valuable and sentimental antique furniture. Based on personal knowledge, Dieffenbach was given the furniture by his parents in 1976 which was stored at the Haworth's residence in 1997 for safekeeping.

Unaware of the pending bankruptcy, Dieffenbach and the Connecticut Superior Court went forward on a hearing on March 19, 2001. The state court denied Dieffenbach's motion but affirmed his right to sue separately for the return of his valuable furniture and money damages.[1]

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[1] On October 25, 2005, the bankruptcy court granted the debtors' request to modify the Automatic Stay *nunc pro tunc*, which had the effect of validating this Connecticut Superior Court hearing.

Dieffenbach discovered the bankruptcy in Fall, 2002 and immediately complained in writing, to no avail, to the panel trustee, Roberta Napolitano. On June 29, 2004 Dieffenbach moved to reopen the Haworth bankruptcy to recover his property, replevin damages and sanctions (including attorney's fees) due to the debtor's willful violation of the Automatic Stay. The bankruptcy court reopened the case on October 26,2004 over the objection of Ms.Napolitano.

At the suggestion of the bankruptcy court, Dieffenbach filed a formal proof of claim on November 17, 2004 for $50,000. Said Judge Shiff, "You want to file a Proof of Claim ... show me how you have a security interest that the replevin laws or conversion laws inure to your benefit." (A-185-186). Dieffenbach's Proof of Claim remains uncontested and enforceable per 11 USC §502(a) and Fed. R. Bankr. P. 3007. Other known creditors include Fleet Bank for $85,000 and thirteen credit card companies for $150,000. Neither appellate court has overruled Dieffenbach's standing as a creditor.

On February 22, 2005 Barbara H. Katz was introduced as successor trustee to the Haworth case at which time the bankruptcy court gave her specific instructions to investigate Dieffenbach's allegations of hidden assets, file a report with the court and gave Dieffenbach an opportunity to reply. To assist in the preparation of his case, Dieffenbach repeatedly and in writing requested copies of the debtor's tax returns and bank statements, already part of the estate file. Katz refused to share this information.

On June 2 and June 27, 2005 Katz and Dieffenbach submitted their respective reports to the bankruptcy court for review. Despite the credible evidence to the contrary, Katz concluded that "no property of the estate exists for a trustee to administer". At a July 19, 2005 hearing, Judge Shiff concurred with Trustee Katz that there are no assets to pursue.

Dieffenbach has consistently argued that the debtor and his attorney failed to schedule and that Trustee Katz refused to acknowledge, marshal and administer known assets totaling $1.3 million, including an equitable interest in the debtor's residence worth $618,900; a husband-wife antiques business $250,000; joint checking account $64,000; and $10,000 cash payment by Dieffenbach post-petition on account of that state court judgment. The District Court ultimately determined that these assets were not property of the estate and thereby exonerated Katz. However, the lower courts did not address nor make any factual findings with respect to a $168,000 note payable which, if pursued, would have satisfied 60% of all unsecured claims ! [2]

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[2] Trustee Katz said in her June 2, 2005 report that this asset had been "abandoned" by the first trustee, therefore not subject to administration. Dieffenbach challenged her conclusion in his reply report citing In re Haralambous, 257 BR 697 (Bankr. D. Conn. 2001) but Katz did not retract her misstatement until pressed by the District Court 2 ½ years later, "Mr. Dieffenbach is correct that you cannot abandon an asset that's not scheduled." (A-582:12-13) This is just one example of a pattern of misstatements by Katz in her report that clearly influenced the bankruptcy court to rule in her favor, leaving creditors without the benefit of a substantial distribution. (Please refer to Dieffenbach's Appellant Brief filed with the Second Circuit.)

At the conclusion of the July 19, 2005 hearing, Judge Shiff deferred the matter to Katz, at her suggestion, to sit down with Dieffenbach to negotiate a settlement "... and get money into the estate including the million dollar property and furniture and bank account and everything else."(A-306:14-17) Instead of negotiating a private sale of assets, Katz offered to sell to Dieffenbach the estate's *causes of action* without recourse. Dieffenbach would not accept the offer without clarification and itemization of the assets underlying the court's directive.

On January 10, 2006 Dieffenbach then filed a Motion to Reconsider the bankruptcy court decision of July 19, 2005, in part, to get clarification of the specific assets to be purchased and to complain that Katz would not cooperate. The bankruptcy court left the issue unresolved and reaffirmed its prior decision.

Dieffenbach promptly filed a Motion to Remove Trustee Katz for "cause" per 11 USC §324 (including fraud, breach of duty, and bad faith conduct) and Request for Damages per 11 USC §362 which were summarily denied and are the basis for this appeal.

Upon appeal, on October 29, 2008 the District Court concluded in its ruling that "Katz exercised her *discretion and business judgment* as trustee in deciding not to prosecute litigation relating to the matters brought to her attention" and that Dieffenbach did not show "cause" for the her removal.

The Circuit Court affirmed the District Court's ruling on December 16, 2009 and went on to say, "Even were we to conclude that Katz acted improperly either by declining to furnish Haworth's tax returns and bank statements ...or by offering to sell Dieffenbach any claims to putative undisclosed assets, see In re Greenberg, 266 BR 45, 48-51 (Bankr. E.D.N.Y. 2001) ... we would perceive no *fraud and actual injury* to the debtor interests compelling Katz's removal as trustee" leaving in doubt adjudication of the companion issues of breach of duty and negligence.

The Circuit Court also dismissed Dieffenbach's Request for Damages due to the willful violation of the automatic stay under 11 USC §362(k) because his pre-petition Motion to Reopen the state court judgment did not *technically* qualify as an "action or proceeding against the debtor" under 11 USC §362(a)(1).

## REASONS FOR GRANTING THE WRIT

The conclusions reached by the appellate courts warrant review and remand by this Honorable United States Supreme Court.

Consider the following compelling arguments: the District Court relied on an inappropriate standard of care when it reviewed Dieffenbach's allegations of potential trustee misconduct; both appellate courts misinterpreted the plain meaning and overall design of the Bankruptcy Code with respect to the trustee's affirmative duties; and finally the Circuit Court improperly and narrowly stated its own case law when it denied Dieffenbach's request for statutory damages per 11 USC §362(k).

### 1. THE DECISION OF THE SECOND CIRCUIT CONFLICTS WITH THE FOURTH CIRCUIT WITH RESPECT TO THE TRUSTEE'S AFFIRMATIVE DUTIES UNDER 11 USC §704.

§704 (Duties of Trustee): The trustee ***shall***:

(1) collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as compatible with the best interests of parties in interest;

.....

(7) unless the court orders otherwise, furnish such information concerning the estate and the estate's administration as is requested by a party in interest.

Bankruptcy Code Section §324(a) provides that "the court, after notice and a hearing, may remove a trustee ... for cause." *Cause has been found to exist ... where the trustee fails to perform his or her duties.* In determining whether the trustee has met that duty, the applicable test is whether the trustee has "exercised due care, diligence and skill as measured by a reasonable person standard." In re Lundborg, 110 BR 106, 109 (Bankr. D. Conn. 1990) citing Matter of Schoen Enterprises, Inc. 76 BR 203 (Bankr. M.D. Fla. 1987) (where the trustee was removed for failure to "...take actions as are necessary to maximize the value of the estate ... coupled with the further failure to furnish such information concerning the estate and the estate's administration as is requested by a party in interest.") "Causes for removal include situations in which ... *the trustee violates the fiduciary duty to the estate.*" ... Collier on Bankruptcy §324.02 (Alan N. Resnick & Henry J. Sommer eds., 16th 2009)

By affirming the decision of the District Court, the Circuit Court relied on a trustee's discretion and business judgment under In re Lundborg, supra, to defend the Trustee Katz's decision not to pursue these significant estate assets. However, a defense of "reasonable discretion and business judgment" is not applicable here because the facts in In re Lundborg dealt with a "trustee's judgment to operate a business and the management decisions which followed" supra at 110. Distinguish the Haworth case where Trustee Katz simply refused to acknowledge known assets of $1.3 million nor marshal or secure same.

In contrast, the Fourth Circuit Court of Appeals has interpreted Bankruptcy Code Section §704(1) as imposing an "affirmative duty" on the trustee to marshal and liquidate estate property. See In re Hutchinson, 5 F3rd 750, 754 (4th Cir 1993) "... discretion and judgment are irrelevant to the application of this rule. The Fourth Circuit went on to say that the standard of care of the bankruptcy trustee was not whether she acted reasonably in general ... but whether she acted "*as expeditiously as was compatible with the best interests [of the creditors],*" reversing its lower court that argued in favor of the considerable discretion enjoyed by bankruptcy trustees. In re Hutchinson, supra 753.

See also Administrative Decision 03-0004, Executive Office of US Trustees, January 21, 2004 "the vigorous pursuit of assets is not discretionary; it is a fiduciary and statutory obligation of a Chapter 7 trustee. 11 USC §704(1) requires that a trustee collect and reduce to money the property of the estate". Further, a trustee has a "duty to maximize the value of the estate ... and in doing so is bound to be vigilant and attentive in advancing the estate's interests", citing Commodity Futures Trading Comm'n v. Weintraub, 471 US 343, 353 (1985). This administrative decision by Lawrence A. Friedman, then Director, Executive Office for US Trustees, continues: "The challenge for any trustee is to turn what appears to be a no asset case into an asset case. This is accomplished most often by identifying and recovering assets that are not disclosed or properly valued, or that are difficult to administer. That is, in fact, the trustee's job."

Similarly, In re Rollins, 175 BR 69, 76 (Bankr. E.D.Cal. 1994) "... some judgments and decisions the Bankruptcy Code requires a trustee to make are discretionary, such as the decision to assume or reject an executory contract ... Other judgments and actions are not discretionary, such as preserving the property of the estate."

The statute §704 appears quite plain in specifying that the trustee's duties are obligatory (ie the trustee "**shall**" act.) As this Honorable Court has noted in construing another provision of the Bankruptcy Code, "when the statute's language is plain, the sole function of the courts" – at least where the disposition required by the text is not absurd – "is to enforce it according to its terms." Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A. 530 US 1, 4 (2000) citing US v. Ron Pair Enterprises, Inc., 489 US 235, 241 (1989). Afterall, Congress "says in a statute what it means and means in a statue what it says there," citing Connecticut Nat'l Bank v. Germain, 503 US 249 (1992).

This inquiry, however, does not end here because we need to consider the overall purpose and design of the Bankruptcy Code to reconcile any possible conflicting provisions of the statute. In the Haworth case, Trustee Katz did have alternative courses of action available to her, but chose not to exercise them: (1) she could have pursued the debtor and his spouse to reach a compromise under Fed. R. Bankr. P. 9019, instead, she made that bad faith attempt to sell her causes of action to Dieffenbach, (2) she could have abandoned all of the alleged estate property

under 11 USC §554 if she truly believed there were no assets of consequential value, (3) she could have sought reimbursement from the debtor's attorney for malpractice, or (4) resign from the case if she thought it was too difficult a task.

Thus, employing the proper standard of care, it is apparent that Katz failed to "expeditiously" marshal and administer important assets, at least with respect to the $168,000 Note Payable. Her conduct constituted gross negligence because, by her own admission to the District Court, she misstated the Rule of Abandonment and thus prejudiced and financially injured creditors. (Refer to Footnote 2.) Katz should be removed for "cause".

Likewise, Katz breached her affirmative duty to furnish financial information to Dieffenbach as requested, "... the trustee has a *fiduciary duty* to provide that information. The language in Code Section §704(7) makes a request for information difficult for a trustee to avoid absent a court order to the contrary." Nat'l Ass'n of Bankruptcy Trustees Chapter 7 Canon of Ethics §22 citing NWFX, Inc., 267 BR 118, 209 (Bankr. W.D. Ark. 2001). Katz did not seek a court order for non-compliance.

Furthermore, Katz breached her affirmative duty to act in good faith when negotiating with Dieffenbach. While a Chapter 7 trustee has a duty of good faith and fair dealing to creditors in the performance of contracts, "bad faith in negotiations may be subject to sanctions." Restatement (Second) of Contracts §205. (See In re Martin, 91 F3d 389 (3rd Cir. 1996)

applying the Restatement to the conduct of a Chapter 7 trustee)

Katz's puzzling offer to sell her causes of action to Dieffenbach was made in bad faith because it did not meet the standards allowing a trustee to sell claims. "...the trustee's authority to pursue these claims may be properly assigned ... provided that such authority is limited to the pursuit of claims on behalf of the estate and that any subsequent recovery is equitably distributed to creditors under the trustee's supervision." In re Greenberg, supra,51.

Again, by her own admission, Trustee Katz did not intend to benefit the estate or participate in any subsequent recovery. Said Katz to the District Court, "Dieffenbach would have recovered everything for his benefit. Nothing would have gone to the estate." (A-579:23-25)

To summarize, in determining possible trustee misconduct and therefore "cause" for removal, the Circuit Court relied on a limited inquiry of the elements of fraud citing In re Freeport Italian Bakery, Inc. 340 F2nd 50, 54 (2nd Cir 1965) and found none, but did not address a trustee's statutory obligations under 11 USC §704. Even the District Court failed to address these same issues.

Accordingly, this Honorable Court should remand the Circuit Court decision to the US Bankruptcy Court to reconsider whether Katz should be removed for "cause" for breach of her affirmative duties given a standard of expeditious conduct.

## 2. THERE IS A CONFLICT BETWEEN *ALL* CIRCUIT COURTS REGARDING THE STANDARD OF CARE FOR IMPOSING PERSONAL LIABILITY ON A CHAPTER 7 BANKRUPTCY TRUSTEE FOR BREACH OF DUTY.

Based on the foregoing discussion, it is apparent that we need to establish an even playing field in the bankruptcy arena to protect the rights of creditors and hold accountable those individuals who threaten the integrity of the bankruptcy system, especially in consumer "no asset" cases where the temptation to cut corners is great.

First, it is imperative that debtors and their attorneys file complete, accurate and honest bankruptcy schedules. It's not just the honor system at stake; these bankruptcy schedules are filed, like income tax returns, under the penalty of perjury.

Second, the Haworth case requires a careful and equitable remedy to balance the need to discipline the misconduct of a single Chapter 7 trustee, Barbara H. Katz, with the overriding policy to encourage and motivate present and future members of the US Trustee Program.

This can be best accomplished by establishing a uniform, national standard for imposing trustee liability.

The current standard and remedy in the Second Circuit for imposing personal liability on a bankruptcy trustee is simple negligence. "There is no question that a trustee in bankruptcy may be held personally liable for breach of his [her] fiduciary duties." In re Gorski, 766 F2d 723 (2nd Cir 1985) citing Mosser v. Darrow, 341 US 267 (1951). "Such liability may attach as the result of negligent as well as knowing or intentional breaches...in the usual case, a surcharge is imposed on the fiduciary in the amount of the actual or estimated financial harm suffered by either the creditors or the estate and is payable accordingly." Gorski, supra, 727.

Noteworthy, however, is that there is a wide and significant split among ***all*** circuit courts on this issue ranging from simple negligence, to gross negligence, to intentional negligence.[3]

Perhaps now is the time for this Honorable Court to adopt a more appropriate and uniform "gross negligence" standard of care governing the conduct of Chapter 7 trustees following the recommendations of the Final Report of the National Bankruptcy Review Commission, "Bankruptcy: The Next Twenty Years," Washington: Government Printing Office, 1997 §3.3.2 (Personal Liability of Trustees) pp. 858-861. The Commission observed that too little

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[3] In his often quoted treatise and detailed appendix, David W. Allard refers to these conflicting opinions as the "crazy quilt" decisions governing trustee personal liability. "Personal Liability of Trustees and Debtors in Possession: Review of the Varying Standards of Care in the United States," Commercial Law Journal, Vol. 106, No. 4 (2002).

protection might expose a trustee to excessive personal liability and dissuade capable people from becoming trustees, while too much protection will not encourage responsible decision making on difficult estate management issues.

Neither appellate court addressed this important remedy, nor made any factual findings thereto.

Upon remand, the next threshold issue is to determine whether Trustee Katz should be held personally liable and surcharged for the loss of assets under a gross negligence standard.

## 3. THE SECOND CIRCUIT ERRED WHEN IT TOOK AN IMPROPERLY NARROW VIEW OF ITS OWN CASE LAW AND INTERPRETATION OF 11 USC §362(k) ALLOWED DAMAGES FOR VIOLATION OF THE AUTOMATIC STAY.

### 11 USC §362 (Automatic Stay):

(a) ... a petition filed under ... this title operates as a stay, applicable to all entities, of (1) the commencement or continuation ... of a judicial, administrative or *other action or proceeding against the debtor* ...and (k) ... an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including cost and attorney's fees, and in appropriate circumstances, may recover punitive damages.

The Circuit Court determined that Dieffenbach's pre-petition state court action, filed February 2, 2001 Motion to Set Aside or Reopen Judgment with the Connecticut Superior Court at Stamford, was **not** an "action against the debtor"; concluding the automatic stay does not apply and therefore Dieffenbach did not qualify for statutory damages.

However, the record shows that both the bankruptcy court and the debtor and his attorney acknowledged in court papers that the automatic stay did apply to Dieffenbach's state court action.[4]

Even without these admissions, the Circuit Court improperly stated its own case law and narrowly interpreted statutory intent. "The automatic stay prevents creditors from reaching the assets of the debtor's estate piecemeal and preserves the debtor's estate so that *all creditors* and their claims can be assembled in the bankruptcy court for a single organized proceeding" In re Colonial Realty, Co. 980 F2d 125, 133 (2nd Cir 1992). The purpose behind Section 362 also indicates that the distinction between "offensive" and "defensive" actions of a party which affect the debtor's estate is an appropriate one to draw in determining the

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[4] The debtor filed and prevailed in his October 5, 2005 Motion to Modify the Stay, "... debtor moves .. that the effect of the automatic stay be annulled as to Dieffenbach's [state court] Motion to Reopen" (Debtor's Appellee Brief A-20) Similarly, the bankruptcy court ordered on January 27, 2006 (A-379) "...the automatic stay is annulled...with regard to all *actions* in the State of Connecticut Superior Court at Stamford, Haworth et. al. v. Dieffenbach, Case CV-00-0177306S.

applicability of an automatic stay" In re Financial News Network, 158 BR 570, 573 (Bankr. S.D.N.Y. 1993)

The Circuit Court recognized in its Summary Order that whether an action is "against a debtor", we look to the debtor's status "at the time of the original proceeding" citing Teachers Insurance and Annuity Assoc. of America v. Butler, 803 F2d 61, 65 (2nd Cir 1986). However, the inquiry does not end there. Since that decision, the Second Circuit issued an important exception to this rule to protect the estate from any action that formally asserts an "offensive posture" against the debtor or the property of the debtor. See Koolik v. Markowtiz, 40 F3d 567 (2nd Cir 1994). Here the Second Circuit stated: "...we construe the term "action or proceeding" for purposes of §362(a)(1) to include *any pleading* [5] [emphasis added] that asserts a claim on which relief is sought ... notwithstanding that the plaintiff initiated the lawsuit." supra, 568. The Circuit Court noted that Dieffenbach failed to file a formal counterclaim in the state court proceeding and thus concluded that Dieffenbach was not entitled to claim Code §362(k) damages. This limited interpretation of the term "any pleading" is clearly inconsistent with its decision under Koolik, supra, and defeats the broad purpose of the automatic stay provisions of the Bankruptcy Code.

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[5] Black's Law Dictionary (9th ed.) defines "Pleading": "A formal document in which a party to a legal proceeding (esp. a civil lawsuit) sets forth or responds to allegations, claims, denials or defenses."

The better interpretation is as follows: despite the fact that debtor Haworth initiated the lawsuit against Dieffenbach in March, 2000 and obtained judgment on October 4, 2000 Dieffenbach formally took an "offensive posture" against the debtor when he filed in state court his pre-petition Motion to Set Aside the Judgment on February 2, 2001, asserted his claims and defenses on which relief was sought and placed debtor's property (ie. the $30,000 money judgment) in jeopardy.

While the Second Circuit has narrowly interpreted the word "action" in the context of an unrelated labor law statute in Local Union No. 38 et. al v. Pelella, 350 F3d 73, 81 (2nd Cir 2003), the court clarified that it "would have no difficulty in reaching the conclusion that the words any 'action, suit or proceeding' are sufficiently broad in their ordinary and commonly accepted meaning to encompass *every form and kind of litigation* including recoupment, counterclaim, set off, suit in equity, and *any other proceeding in which rights are determined.*"

Therefore, under the modified rule in Koolik, the automatic stay applies and Dieffenbach's request for damages should go forward.

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Note: References in this Petition are made to Appellant Dieffenbach's Special Appendix (A-____) filed with the US Court of Appeals for the Second Circuit, Case #08-5791-bk.

## CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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May, 2010

# APPENDIX A

## UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## SUMMARY ORDER

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 16th day of December, two thousand nine,

PRESENT: RALPH K. WINTER
RENNA RAGGI
DEBRA ANN LIVINGSTON
*Circuit Judges.*

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In re JOHN BRIAN HAWORTH, *Debtor*,

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JEFFERY DIEFFENBACH, *Appellant*,

v.

JOHN BRIAN HAWORTH
TRUSTEE, BARBARA KATZ, Appellees,

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APPEARING FOR APPELLANT: JEFFERY DIEFFENBACH, pro se, Newport, Rhode Island

APPEARING FOR APPELLEES:

FRANCIS J. BROWNE, Stamford, Connecticut for John Brian Haworth.
BARBARA H. KATZ, pro se, New Haven, Connecticut

Appeal from the United States District Court for the District of Connecticut (Christopher F. Droney, Judge)

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment entered on October 29, 2008, is AFFIRMED.

In 2004, pro se appellant Jeffery Dieffenbach moved to reopen his former father-in-law John Brian Haworth's chapter 7, "no asset" bankruptcy. See 11 USC 701 et. sec. Dieffenbach now appeals from the district court's affirmance of the bankruptcy court's orders (1) declining to remove Barbara Katz as bankruptcy trustee, and (2) denying Dieffenbach's request for damages from Haworth's estate. We review the bankruptcy court decision independently, accepting its factual findings unless clearly erroneous but reviewing its conclusions of law de novo." In re Enron Corp. 419 F3d 115, 124 (2nd Cir 2005). In doing so, we assume the parties' familiarity with the facts and the record of prior

proceedings, which we referenced only as necessary to explain our decision to affirm.

1. Removal of Trustee Katz

The bankruptcy "court ... may remove a trustee ... for cause." 11 USC 324(a). In defining "cause" for removal, "[we] have traditionally stressed the elements of fraud and actual injury to the debtor interests." In re Freeport Italian Bakery, Inc. 340 f2d 50, 54 (2nd Cir 1965) (quoting Schwartz v. Mills, 192 F2nd 727, 729 (2nd Cir 1951)); accord In re Lundborg, 110 BR 106, 108 (Bankr. D. Conn. 1990); see also 3 Collier on Bankruptcy 324.02 (Alan N. Resnick and Henry J. Somme eds., 16th ed. 2009) ("Generally, the courts will not remove a trustee absent fraud or injury.") We review the bankruptcy court's removal decision for abuse of discretion, see In re Eliose Curtis, Inc. 326 F2d 698, 701 (2nd Cir 1964); In re paramount Publix Corp, 68 F2d 703, 705 (2nd Cir 1934), and we detect none here.

Dieffenbach submits that Katz should have been removed for (1) failing to acknowledge and administer putative undisclosed assets; (2) failing to furnish requested financial information to Dieffenbach; and (3) offering to sell the trustee's claims to Dieffenbach. We are not persuaded. If Katz had "not fulfilled [her] duty as trustee to press all legitimate claims of the estate," In re Freeport Italian Bakery, Inc. 340 F2d at 55, then there might have been cause for her removal. But the record shows that Katz thoroughly investigated each of

Dieffenbach's proposed claims and ultimately concluded, in two detailed reports, that "no property of the estate exists for a trustee to administer." Trustee's Report at 14. Katz's conclusion accorded with that of her predecessor trustee, Roberta Napolitano, who previously examined Dieffebach's arguments and similarly concluded that there we no grounds to reopen the Haworth bankruptcy. On this record, we identify no error, much less abuse of discretion, in the bankruptcy court's decision not to remove Katz.

Moreover, even were we to conclude that Katz acted improperly either by declining to furnish Haworth's tax returns and bank statements, see 11 USC 704(a)(7), or by offering to sell Dieffenbach any claims to putative undisclosed assets, see In re Greenberg, 266 BR 45, 48-51 (Bankr. E.D.N.Y. 2001) (discussing standard for allowing trustee to sell claims); cf. In re Commodore Int'l Ltd., 262 F3d 96 (2nd Cir 2001) (involving standing of creditors to bring claims in name of bankruptcy debtors), we would perceive no "fraud and actual injury to the debtor's interests" compelling Katz's removal as trustee, In re Freeport Italian Bakery, Inc. 340 F2d at 54. Accordingly, we affirm the decision of the bankruptcy court.

2. Request for Damages

Dieffenbach also submits that he is entitled to damages as "an individual injured by a willful violation of" the automatic stay. 11 USC 362(k)(1). The automatic stay applies to any "action or

proceeding against the debtor". Id 362(a)(1) (emphasis added). An "action or proceeding" includes "any pleading that asserts a claim on which relief is sought." Koolik v. Markowtiz, 40 F3d 567, 568 (2nd Cir 1994), "Thus, an answer that asserts a counterclaim against a plaintiff who becomes a bankruptcy debtor is an 'action or proceeding against the debtor' within the meaning of 362(a)(1)." Id. In determining whether an action is "against the debtor," we look to the debtor's status "at the time of the original proceeding," not to "which party is ahead at a particular stage in the litigation." Teachers Ins. & Annuity Ass'n of Am. v. Butler, 803 F2d 61, 65 (2nd Cir 1986).

Dieffenbach contends that Haworth violated the automatic stay by (1) contesting Dieffenbach's post-petition motion to reopen a state court proceeding, which the debtor brought against Dieffenbach and which resulted in a pre-petition stipulated judgment of $30,000 for the debtor; and (2) collecting $10,000 of that judgment after filing for bankruptcy. We disagree. As the district court noted, Dieffenbach failed to tile a counterclaim in the state court proceeding. Thus, we are directed to no "pleading" stating any claim against the debtor that could violate the automatic stay. Koolik v. Markowitz, 40 F3d at 568. Dieffenbach's suggestion that a motion to reopen the state court judgment qualifies as an action "against the debtor" confuses which party might be ahead at a particular stage in litigatin with their status at the outset of the procedding. See Teachers Ins. & Annuity Ass'n of Am. v. Butler, 803 F2d at 65. Accordingly, we

conclude that, even if Dieffenbach were injured by Haworth's appearance contesting his motion to reopen the state court proceeding, he is not entitled to damages for any violation of the automatic stay.

We have considered Dieffenbach's other arguments on appeal and conclude that they lack merit. Accordingly, we AFFIRM the judgment of the district court.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, Clerk of Court

By: _____

# APPENDIX B

## UNITED STATES DISTRICT COURT
## DISTRICT OF CONNECTICUT

In re:

JOHN BRIAN HAWORTH, Debtor

JEFFERY DIEFFENBACH, Appellant
v.
JOHN BRIAN HAWORTH, Debtor
JEAN HAWORTH, his wife
BARBARA KATZ, Trustee
UNITED STATES TRUSTEE,
Appellees

Bankruptcy No. 01-5-0184

Civil Action No. 3:06 CV 403 (CFD)

## RULING ON BANKRUPTCY APPEAL

Appellant *pro se* Jeffery Dieffenbach [1] has appealed the decision of the Bankruptcy Court in the no-asset Chapter 7 bankruptcy case of John Haworth. Dieffenbach appeals the Bankruptcy Court's orders refusing to remove Trustee Barbara Katz and denying Dieffenbach's Motion for Damages

[1] Dieffenbach is an attorney.

for Willful Violation of the Automatic Stay of January 31, 2006 [2]. Dieffenbach claims that he is a creditor of the estate and argues that Katz should have been removed as trustee because she failed to acknowledge and administer cash assets of the estate exceeding $1 million as required by 11 USC 704(1), did not furnish information concerning the estate as requested by a party in interest, as required by 11 USC 704(7), and violated her fiduciary duty by failing to act in good faith when she offered to sell all causes of action held by the estate to Dieffenbach. He also argues that the Bankruptcy Court incorrectly relied on Trustee Katz's advice that an annulled Automatic Stay precluded Dieffenbach's request for damages resulting from the debtor and his wife's alleged violation of the automatic stay during a state court proceeding of March 19, 2001, and that the Bankruptcy court erred by denying his request without considering its merits. For the reasons set forth below the Bankruptcy Court's decisions are affirmed.

## I. Background

John Haworth (the "Debtor") filed a no-asset Chapter 7 bankruptcy petition on February 16, 2001. Haworth's wife did not join her husband in filing for bankruptcy protection. Roberta Napolitano was appointed trustee of the bankruptcy estate.

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[2] Orders of Bankruptcy Judge Alan H. W. Shiff, Feb 7, 2006 denying Dieffenbach's motion (Bankr. Case No. 01-50184 ASWS, Dkt. #132) and sustaining the objections of the United States Trustee (Dkt. #134) and of Trustee Katz (Dkt. #133).

Haworth was discharged on June 12, 2001; Napolitano filed a Report of No Distribution on September 4, 2001 and the case was closed on September 12, 2001.

Unrelated to the bankruptcy case, Dieffenbach, the Haworth's former son-in-law, had previously stipulated as defendant, with John and Jean Haworth as plaintiffs, that a judgment in the Connecticut Superior Court would enter against him and in favor of the plaintiffs for $30,000. On February 13, 2001, the plaintiffs agreed to accept $10,000 from Dieffenbach in settlement of the claim.[3] Then, in the fall of 2000, Dieffenbach learned of the Debtor's bankruptcy case, which had been closed. On June 29, 2004 Dieffenbach requested that the bankruptcy case be re-opened, claiming that he was a creditor of the estate because the Debtor and his wife possessed two pieces of valuable furniture that they refused to return to Dieffenbach, and that the estate owned substantial undisclosed assets. The Debtor denied that

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[3] Dieffenbach did not file any courterclaim in the Superior Court proceeding. Before Dieffenbach or the state court became awre of the bankruptcy petition, Dieffenbach pursued, and the Superior Court denied, a motion to set aside the stipulated judgment. Dieffenbach based his motion on his assertin that the return of certain items of furniture was a condition of the settlement of the Superior Court judgment, and that this condition had not been fulfilled. See Transcript of Proceedings before the Bankruptcy Court, Oct. 25, 2005. Dieffenbach's alleged claim to the furniture appears to have originated from his divorce from the Debtor's daughter in the Connecticut Superior Court. The Court in the instant action does not address the substantial issue of whether Dieffenbach is a creditor for purposes of standing under 11 USC §101(10).

Dieffenbach was a creditor or that any assets existed. Trustee Napolitano met with Dieffenbach, reviewed his documents and arguments, and concluded that he was not a creditor and that there were no grounds to reopen the bankruptcy case. Bankruptcy Judge reopened the case "for the limited purpose of considering the movant's request to file a proof of claim and request an order voiding the state court judgment as in conflict with the automatic stay." (Dkt. #41). Judge Shiff ordered the United States Trustee to appoint a successor trustee in the bankruptcy case, and Barbara Katz was appointed on February 18, 2005. Trustee Katz also concluded upon her initial review that the estate was a no-asset case. Judge Shiff directed Katz to search for assets, meet with Dieffenbach and file a report with the Court.

Trustee Report by Katz Regarding Potential Assets of the Estate.

Katz's report included consideration of the Debtor's marital home, which was purchased by the Debtor and his wife in 1976. The Debtor had transferred his interest in the property in December 1994 by quitclaim deed to his wife, but remained married and continued to live there at that time. In February 2004, Mrs. Haworth conveyed the property by quitclaim deed to the Debtor and herself as joint tenants with rights of survivorship and the property was sold shortly thereafter. The net assets from the sale were placed in the sole custody of Mrs. Haworth.

Although Katz concluded that it was probable that the 1994 transfer of the property from the Debtor to his wife was voidable as a fraudulent transfer under Connecticut law, see CGSA 52-552a-52-5521, the four-year statute of limitations to avoid a fraudulent transfer expired in 1998, and therefore the bankruptcy estate could not have voided the transfer in 2001. Katz also considered and cited in her report Connecticut law on resulting trusts. She concluded that no resulting trust existed. [4] Furthermore, Katz believed that in order to prosecute an action against Mr. Haworth the estate would have to retain an attorney on a contingency fee basis. Katz concluded that she would be unable to find an attorney willing to take the case, considering that Mrs. Haworth lived in England, and that several defense claims and proof issues would have to be overcome.

Katz's report also considered Dieffenbach's claims regarding several alleged undisclosed assets of the estate, including the "Bird in Hand" antique business operated as a sole proprietorship by Mrs. Haworth. The report considered the "implied partnership" argument and concluded that no evidence showed the Debtor and Mrs. Haworth carried on the business as co-owners, nor that they divided profits. The business was therefore not an undisclosed asset of the bankruptcy estate.

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[4] Although there is some dispute as to the interpretation of the Bankruptcy Court's exact words, the transcripts, when taken in context, indicate that Judge Shiff agreed with Katz that no resulting trust existed.

Finally, the report concluded that the $10,000 settlement received by the Debtor and his wife as a result of the Connecticut Superior Court judgment was subject to an exemption that could have been properly asserted by the Debtor. Therefore, it would have been unnecessary for Trustee Napolitano to take possession of the $10,000 only to turn it back over to the Debtor after the exemption was asserted in Court. Collection of the $10,000 was not in violation of the automatic stay, which applies only to anon-exempt property of the estate. Finally, Dieffenbach would not e entitled to the return of any portion collected in which Mrs. Haworth had an interest, because he interests (as a non-filer for bankruptcy protection) vis-a-vis Dieffenbach would not have been affected by the automatic stay.

**Subsequent Proceedings**

A hearing was held on the Trustee's Report on July 19, 2005. Katz reported that although she did not believe the estate to have any assets worth pursuing, she had offered to sell "whatever claims the estate may have" to Dieffenbach to pursue for his own benefit, including the claim as to the alleged resulting trust in the marital home. The offer was held open until on or about October 31, 2005 but was not accepted by Dieffenbach. On October 31, 2005 the Bankruptcy Court annulled the automatic stay *nunc pro tunc* to 2001, and on November 15, 2005 Katz filed a Report of No Distribution.

On January 10, 2006 Dieffenbach filed a motion to remove Katz as trustee. The United

States Trustee filed objections to the motion and a hearing was held on January 31, 2006. The Bankruptcy Court denied his motion. Dieffenbach also filed his request for damages on January 10, 2006. The alleged damages included actual damages and attorney's fees, damages due to emotional distress, and the return of the $10,000 he paid in settlement of the Superior Court judgment. Judge Shiff also denied this request and indicated that the case would be closed. Dieffenbach filed his notice of appeal on February 7, 2006 (amended February 17, 2006).

## II. Applicable Law

### A Standard of Review

Pursuant to Bankruptcy Rule 8013 and case law thereunder, a bankruptcy court's conclusions of law are reviewed *de novo*, and its factual, findings are reviewed under a "clearly enoneous" standard. In re JLM, Inc. 210 BR 19, 23 (2nd Cir BAP 1997) (citing Nat'l Union Fire Ins. Co. of Pittsburgh v. Bonnanzio, 91 F3d 296, 300 (2nd Cir 1996)). Fed R. Bankr. P. 8103 provides that "findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses." This standard affords great deference to the bankruptcy court's determination. A finding of fact is clearly erroneous within the meaning of Rule 8013 when "although there is evidence to support it, the reviewing court on the entire record is left with

the definite and firm conviction that a mistake has been made...While the trial court's findings of fact are not conclusive on appeal, the party that seeks to overturn them bears a heavy burden... To be clearly erroneous, a decision my strike [us] as more just maybe or probably wrong, it must ... strike [us] as wrong with the force of a five-week-old, un refrigerated dead fish." In re Reilly, 245 BR 768, 772 (2nd Cir BAP 2000), aff'd without opinion 242 F3d 367 (2nd Cir 2000). Mixed questions of law and fact are presumptively subject to de novo review. Id. (citing In re Bammer, 131 F3d 788 (9th Cir 1997)

B. Legal Standards for Removal of and Duties of Bankruptcy Trustees.

The Bankruptcy Court may remove a Trustee "for cause" after notice and a hearing under the authority of 11 USC 324. "Cause, which is not defined in the statute, must be determined on an ad hoc basis. Cause has been found to exist, *inter alia*, where the trustee is not disinterested, and where the trustee fails to perform his or her duties, or unreasonably delays in the performance of those duties. In general, a party seeking the removal of a trustee must prove that thee has been some actual injury or fraud. A trustee should not be removed for mistakes in judgment where that judgment was discretionary and reasonable under the circumstances, and courts should consider the best interests of the estate, rather than those of a single movant-creditor, when determining whether to remove a trustee." In re Lundborg, 110 BR 106, 108 (Bankr. D. Conn 1990).

"A trustee is the fiduciary of all the creditors of a bankruptcy estate, but owes a primary duty to unsecured creditors." Id at 109. "In determining whether the trustee has met that duty, the applicable test I whether the trustee has exercised due care, diligence, and skill as measured by a reasonable person standard, ie whether the trustee has acted as an ordinarily prudent person would have acted under similar circumstances and with a similar purpose." Id. "A chapter 7 trustee is required to locate and bring into the estate all of the property of the estate; determine whether there is an equity for the estate; and if there is, liquidate the property in an efficient manner and distribute the proceeds to creditors in accordance with the distribution scheme established by the Code." Id. (citing 11 USC 541(a), 704(1), 726). "As a general rule, a trustee should not abandon property, file a Report of No Distribution, or consent to relief from the automatic stay unless he has determined that the property is of no or "inconsequential value and benefit to the estate." Id (citing 11 USC 554(a) ("After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.")) **III. Discussion**

A. Request for Removal of Trustee Katz

Dieffenbach's first argument is that Katz should have been removed as trustee because she failed to acknowledge and administer cash assets of the estate exceeding $1 million as required by 11 USC 704(1), did not furnish information concerning

the estate as required by a party in interest, as required by 11 USC 704(7), and violated her fiduciary duty by failing to act in good faith when she offered to sell all causes of action held by the estate to Dieffenbach. [5]

This Court reviews the Bankruptcy Court's factual findings as to the thoroughness, competence and good faith performance of fiduciary duties by Trustee Katz for clear error and finds that no error was committed. The Bankruptcy Court's decision not to remove Trustee Katz finds support in the consistency between Katz's conclusions and those of the first Trustee, Napolitano, who also found that no assets of value existed for the estate. The Bankruptcy Court's decision also finds support in the

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[5] Dieffenbach bases this argument on assertion that Katz (1) failed to acknowledge an undisclosed $64,000 in cash assets of the estate, (2) did not include in the estate the debtor's beneficial interest in the marital residence, to which title was held by the debtor's wife, (3) did not agree with Dieffenbach's conclusion that a "resulting trust" in the real estate existed via "a contingent and unliquidated equitable lien" consistent with the Bankruptcy Court's decision in the case of In re Bassett, 221 BR 49 (Bankr. D. Conn. 1998), (4) did not include in the estate assets of the "implied partnership" interest in "Bird in Hand" antiques business of the debtor's wife, (5) refused to provide Dieffenbach with copies of the debtor's tax returns and "other relevant information", (6) did not withdraw her Report of June 2, 2005 finding that the estate had no assets, and (7) allegedly refused to meet with Dieffenbach to discuss an itemized settlement of his claims. Dieffenbach also claims on behalf of Fleet Bank that the Trustee was not served with a copy of the Trustee's Report; however, Dieffenbach lacks standing to assert claims on behalf of Fleet Bank and in any case Fleet Bank has not chosen to appear regarding any proceedings since at least August 1, 2005.

position of the U.S. Trustee, which objected to the removal of Trustee Katz and testified to her thoroughness, diligence, and "willingness to look under every peach basket trying to find hidden assets" during the January 31, 2006 hearing. The U.S. Trustee testified that after Dieffenbach objected to the findings of Trustee Napolitano, Katz was chosen to be the second Trustee specifically because these qualities would be necessary to the second Trustee, who would "be under Mr. Dieffenbach's microscope." [6]

Finally, the Bankruptcy court's decision not to remove Katz as trustee was not clear error in light of Katz's comprehensive Report Regarding Potential Assets of the Estate of June 2, 2005, which addressed in detail all of the issues raised by Dieffenbach prior to 2005, and found none of them to justify re-opening the estate or pursuing any assets. Katz exercised her discretion and business judgment as trustee in deciding not to prosecute litigation relating to the matters brought to her attention by Dieffenbach. Her disagreement with Dieffenbach, one alleged creditor, as to either the existence of hidden assets or his right to information including the tax returns of Mr. and Mrs. Haworth did not constitute any "cause" for her removal.

B. Request for Damages

Dieffenbach next argues that the Bankruptcy Court should not have denied his request for

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[6] Testimony of US Trustee Steven Mackey, Jan 31, 2006 hearing transcript at 27-28.

damages because he is a creditor of the estate who suffered when the Debtor and his wife violated the automatic stay and collected a $10,000 settlement payment from Dieffenbach. This argument is unsuccessful for several reasons.

First, settlement of an unrelated state court claim between the Debtor's wife and Dieffenbach is not precluded by bankruptcy's automatic stay, which prevents creditors of the seeker of bankruptcy protection from collecting against the assets of the bankruptcy estate, but does not preclude the Debtor's non-filing wife from seeking to pursue a judgment or settlement in which she is a plaintiff. The Bankruptcy Court did not commit any error in making its conclusions of law as to this point. Thus Dieffenbach would not be entitled to repayment of the full amount of his $10,000 settlement payment even if he wee successful in raising this issue against the Debtor as part of the bankruptcy case.

Second, Dieffenbach's assertion that he is a creditor of the estate is based soley on the alleged possession by the Debtor of two pieces of furniture which the Debtor claims never belonged to him (but rather belonged to his wife, who ran an antique furniture business.) Dieffenbach's labeling of his claim to the furniture as that of a "creditor" of the bankruptcy estate appears merely to be an attempt to revisit in federal court the state court's judgment against him and his subsequent settlement of that judgment. Furthermore, the furniture appears to be located in England, and thus I not easily subject to normal debt collection procedures available to the

Trustee or the Bankruptcy Court, even if it were appropriately included in the assets of the estate. Though the Bankruptcy Court did not make any direct factual findings that Dieffenbach was not a creditor, its disposition of the case implies that conclusion. In light of the lack of evidence supporting Dieffenbach's claims, and the evidence in the record suggesting that these claims were an outgrowth of state court proceedings hat had been resolved prior to the resolution of the bankruptcy case, a conclusion that Dieffenbach was not a creditor would not have been clear error.

Third, Dieffenbach had the opportunity to pursue his claims for damages in the original state court proceeding but (a) failed to file a counterclaim in that proceeding, and (b) entered into a stipulated judgment and settlement in that proceeding. The Bankruptcy Court did not err in concluding that re-opening the bankruptcy case was not an appropriate method for Dieffenbach to attempt to pursue these claims.

Fourth, Dieffenbach's assertion that the Bankruptcy Court did not consider the merits of his argument is not supported by the evidence. Judge Shiff re-opened the bankruptcy case and appointed a seond Trustee who re-examined the state over the course of approximately on year solely on the basis of Dieffenbach's complaint, and then held several hearings to consider the progress of Trustee Katz's search for assets before ultimately deciding, in agreement with Trustee Katz, that no assets existed

and that Dieffenbach had more than ample opportunity to be heard.

In short, this Court finds no reason to believe that the Bankruptcy Court committed clear error in agreeing with both Trustees and with the U.S. Trustee that there were no assets properly pursued for the benefit of the estate and its creditors. Dieffenbach did not show cause for the removal of Trustee Katz. He did not show that Katz committed intentional misconduct or even negligence in her search for hidden assets of the estate. He did not who that he had been actually injured by her actions, or that fraud had been committed by either Katz or Napolitano.

## IV. Conclusion

For the foregoing reasons, the orders of the bankruptcy court are AFFIRMED. The Clerk is ordered to close this case.

SO ORDERED this 29th day of October, 2008, at Hartford, Connecticut.

CHRISTOPHER F. DRONEY
UNITED STATES DISTRICT JUDGE

# APPENDIX C

## UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At the stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 5th day of March, two thousand ten.

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In re JOHN BRIAN HAWORTH, *Debtor*,

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JEFFERY DIEFFENBACH, *Appellant*,

v. No. 08-5791-bk

JOHN BRIAN HAWORTH
TRUSTEE, BARBARA KATZ, Appellees,

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Jeffery Dieffenbach having filed a petition for panel rehearing, or in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing en *banc*,

IT IS HEREBY ORDERED that the petition is denied. FOR THE COURT, CATHERINE O'HAGAN WOLFE, Clerk of Court.